No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

In Re: Richard DeCaro - Petitioner

PETITION FOR AN EXTRAORDINARY WRIT AUTHORIZED BY 28 U.S.C. §1651(a)

PETITIONER'S APPENDICES

Richard DeCaro, 24317-044
Federal Correctional Institution
Post Office Box 6000
Florence, Colorado 81226
719.784.9100

APPENDIX "A"

United States of America, Appellee, v. Daniel Basile, Appellant. United States of America, Appellee, v. Richard DeCaro, Appellant.
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
109 F.3d 1304; 1997 U.S. App. LEXIS 6123
No. 96-2744, No. 96-2746
January 16, 1997, Submitted
April 1, 1997, Filed

Editorial Information: Subsequent History

As Corrected April 10, 1997. Rehearing and Suggestion for Rehearing En Banc Denied (96-2746) May 9, 1997, Reported at: 1997 U.S. App. LEXIS 10833. Certiorari Denied October 6, 1997, Reported at: 1997 U.S. LEXIS 5509. Certiorari Denied October 6, 1997, Reported at: 1997 U.S. LEXIS 5408.

Editorial Information: Prior History

Appeals from the United States District Court for the Eastern District of Missouri. 1:96CR5 SNL. Honorable Stephen Limbaugh, District Judge.

Disposition:

Affirmed.

Counsel Counsel who presented argument on behalf of the appellant Basile, was Thomas F. Flynn, Federal Public Defender, of St. Louis, Missouri. Counsel who presented argument on behalf of the appellant, DeCaro, was N. Scott Rosenblum, of St. Louis, Missouri. Susan Kister appeared on the brief.

Counsel who presented argument on behalf of the appellee was Thomas E. Dittmeier of St. Louis, Missouri.

Judges: Before BOWMAN and MURPHY, Circuit Judges, and KYLE, 1 District Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants sought review of the order from the United States District Court for the Eastern District of Missouri, which entered verdicts convicting them for murder-for-hire, conspiracy to commit murder-for-hire, and mail fraud.Defendants' double jeopardy rights were not violated as the doctrine of dual sovereignty applied, the defenses were not so antagonistic as to require a severance, and the required nexus between interstate commerce and the crime was established.

OVERVIEW: Defendants were convicted by a jury for murder-for-hire, conspiracy to commit murder-for-hire, and mail fraud. On appeal, defendants contended that the federal prosecution was a violation of their rights under the Double Jeopardy Clause of the U.S. Constitution, that the district court abused its discretion in denying their motions for separate trials, and that there was insufficient evidence that interstate facilities were used in furtherance of the murder-for-hire scheme. The court held that (1) under the tenets of dual sovereignty each sovereign derived its power from a different constitutional source, so both sovereigns might have prosecuted and punished the defendants for the same act, (2) the defenses of defendants were not so antagonistic as to be irreconcilable and that defendants did not meet their heavy burden of demonstrating the prejudice required for reversal, and that (3) the insurance transactions involving the stolen vehicle and items taken from one defendant's van and home provided

the required nexus between the mail in interstate commerce and the murder-for-hire to sustain defendants' conviction. The court affirmed the convictions.

OUTCOME: The court affirmed the order from the district court convicting defendants.

LexisNexis Headnotes

Criminal Law & Procedure > Double Jeopardy > Dual Sovereignty Doctrine

Under the doctrine of dual sovereignty federal prosecution following state prosecution of the same person for the same acts does not violate the defendant's criminal rights. According to the tenets of dual sovereignty, each sovereign derives its power from a different constitutional source, so both may prosecute and punish the same individual for the same act.

Criminal Law & Procedure > Double Jeopardy > Attachment Jeopardy
Criminal Law & Procedure > Double Jeopardy > Dual Sovereignty Doctrine

A state prosecution will be deemed unconstitutional when the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.

Criminal Law & Procedure > Double Jeopardy > Dual Sovereignty Doctrine

A United States attorney may not prosecute a person in federal court if the alleged criminality was an ingredient of a previous state prosecution against that person unless the federal prosecution is specifically authorized in advance by the Department of Justice itself, upon a finding that the prosecution will serve compelling interests of federal law enforcement.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Defendants
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview

The appellate court will not reverse a denial of a motion to sever unless it finds that the denial of severance was an abuse of discretion resulting in "severe or compelling prejudice" to the accused.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Defendants
Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements

There is a preference in the federal system for joint trials of defendants who are indicted together. A joint trial is especially compelling when the defendants are charged as co-conspirators. But whether or not the codefendants also are charged as co-conspirators, the presumption against severing properly joined cases is strong.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Defendants

Mutually antagonistic defenses are not prejudicial per se, and even blame- shifting on the part of the defendants is not a sufficient reason for severance. Co-defendants are often hostile to one another, and one will try frequently to point the finger, to shift the blame, or to save himself at the expense of the other. Such tactics rise to the level of antagonistic defenses requiring severance only when there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.

Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Severance of Defendants

To demonstrate the severe or compelling prejudice necessary to show that the court abused its discretion in denying severance, a defendant must show that his defense was irreconcilable with that of the codefendant or that the jury was unable to compartmentalize the evidence.

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence

The appellate court views the evidence in the light most favorable to the guilty verdict, giving the government the benefit of all reasonable inferences that may be drawn from the evidence. After reviewing the evidence under these standards, it will reverse only if it concludes that no reasonable jury could find guilt beyond a reasonable doubt. The court may affirm even if the evidence is entirely circumstantial.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > General Overview
Criminal Law & Procedure > Criminal Offenses > Homicide > Solicitation of Murder > General Overview
Criminal Law & Procedure > Criminal Offenses > Homicide > Solicitation of Murder > Elements

See 18 U.S.C.S. § 1958(a).

Opinion

Opinion by: BOWMAN

Opinion

{109 F.3d 1306} BOWMAN, Circuit Judge.

Richard **DeCaro** and Daniel Basile appeal from the judgments of the District Court 2 on jury verdicts finding them guilty on charges of murder-for-hire, conspiracy to commit murder-for-hire, and mail fraud. We affirm.

I.

This case arises from the execution-style murder of Elizabeth **DeCaro**, wife of Richard **DeCaro**, on March 6, 1992. She was found shot to death that Friday night in the kitchen of her home in St. Charles, Missouri (a suburb of St. Louis), the gun barrel having been pressed up against the back of her neck and fired twice. Her husband, who recently had been having an extramarital affair with his secretary, had taken the couple's four children (and the family dog, which was not known to travel with the family because it was very excitable around strangers) to the Lake of the Ozarks in south Missouri for the weekend. He had told Elizabeth that he wanted a "daddy's weekend" alone with the children. **DeCaro** and the children left St. Charles shortly after noon on March 6, while Elizabeth was still at work. Later that afternoon, Elizabeth was murdered and the family's Blazer was stolen from the garage of the home. These incidents followed by about a month the theft of the family van from the **DeCaro** home in the early morning hours of February 8, 1992; the van was found in southeast Missouri and had been burned. **DeCaro** reported that various items were missing from the van, including the garage door opener for the **DeCaro** home.

A few days after the murder, first Basile and then **DeCaro** were arrested on state charges of murder.

In May 1994, Basile was tried as the hit man, was convicted, and was sentenced to death. His direct appeal in the state proceeding has been submitted to the Missouri Supreme Court. In a separate trial in September 1994, DeCaro was acquitted on state murder charges.

In May 1995, a federal grand jury indicted Basile and DeCaro on murder-for-hire and mail fraud charges. Specifically, both men were charged with use of the mail or facilities in interstate commerce with intent to commit murder-for-hire, 18 U.S.C. § 1958 (1988 & Supp. IV 1992); conspiracy to commit murder-for-hire, 18 U.S.C. §§ 1958, 371 (1988 & Supp. IV 1992); and mail fraud, 18 U.S.C. § 1341 (Supp. IV 1992). 3 After a joint jury trial both men were found guilty of all charges against them and each was sentenced to life in prison.

DeCaro and Basile both raise the same three issues on appeal. They claim this federal prosecution, following as it did the state prosecution, is a violation of their rights under the Double Jeopardy Clause of the Constitution. They also argue that the District Court abused its discretion in denying their motions for separate trials. Finally, both challenge the court's denial of their motions for judgment of acquittal, and contend that there was insufficient evidence that interstate facilities were used in furtherance of the murder-for-hire scheme.

II.

DeCaro and Basile argue that they were twice put in jeopardy for the same crime in violation of their constitutional rights, *see* U.S. Const. amend. V, and that the District Court erred in refusing to dismiss the indictment on those grounds. We review de novo. *See United States v. McMasters*, 90 F.3d 1394, 1401 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 718, 783 (1997).

A.

It has long been the law under the doctrine known as dual sovereignty that federal prosecution following state prosecution **{109 F.3d 1307}** "of the same person for the same acts" does not violate the defendant's criminal rights. *Abbate v. United States*, 359 U.S. 187, 194, 3 L. Ed. 2d 729, 79 S. Ct. 666 (1959); *see also United States v. Halls*, 40 F.3d 275, 277-78 (8th Cir. 1994), *cert. denied*, 131 L. Ed. 2d 579, 115 S. Ct. 1721 (1995). According to the tenets of dual sovereignty, each sovereign derives its power from a different constitutional source, so both may prosecute and punish the same individual for the same act. *See Abbate*, 359 U.S. at 193-94. Basile acknowledges that his federal convictions "do not appear to offend the double jeopardy clause of the Fifth Amendment under current Supreme Court law." Brief of Basile at 31. DeCaro, on the other hand, would have this Court decide that, because federal prosecution for the murder of Elizabeth DeCaro followed his acquittal on state charges for the same act, "the purpose [of the federal prosecution] is improper and the prosecution should be quashed." Brief of DeCaro at 43. We disagree.

The Supreme Court has created an exception to the dual sovereignty doctrine, concluding that a state prosecution will be deemed unconstitutional when "the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution." *Bartkus v. Illinois*, 359 U.S. 121, 124, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959). Here DeCaro argues the converse: that the federal government was used as a "tool" by state prosecutors after the state prosecution of DeCaro failed, in order to advance a state interest--the conviction of DeCaro for the murder of his wife--where the state could not legally do so itself. *See United States v. Talley*, 16 F.3d 972, 974 (8th Cir. 1994). As a legal proposition, DeCaro's claim requests an extension of *Bartkus*, but he directs us to no opinion wherein this Court has held that the *Bartkus* exception applies when it is the federal prosecution that follows the state prosecution. We acknowledge, however, that other panels of this Court have assumed, without squarely deciding, that a *Bartkus*-type exception applies to a situation such as we have here. *See, e.g., United States v. Williams*, 104 F.3d 213, 216 (8th Cir. 1997); *Halls*,

40 F.3d at 278.

Because the question was not briefed and argued, and because it is not necessary to our holding today, we do not decide how far *Bartkus* may be extended. For even if DeCaro's claim properly is regarded as falling within the *Bartkus* exception to the dual sovereignty doctrine, the claim fails for lack of factual foundation. **DeCaro** has not directed this Court to anything in the record that supports his claim of collusion between the two sovereigns. Indeed, his claim is based on little more than chronology: he was acquitted on state charges, and then later he was tried on federal charges arising from the same events. But it would take far more than mere chronology of this sort to render the federal government a "tool" of the state, or the federal prosecution "a sham and a cover" for a *de facto* state prosecution.

DeCaro further asserts that the federal prosecution must have been manipulated by the state because the prosecution was for "an unremarkable case of spousal murder" and "a garden variety contract killing" with "questionable" federal interest. Brief of **DeCaro** at 44. We disagree. While contract killing, standing alone, may not be a federal crime, it may become such when its perpetration involves the use of the mail or facilities in interstate commerce. The independence and importance of the federal interest in protecting the channels of interstate commerce from the taint of crime is unaffected by DeCaro's previous acquittal in state court; it remains just as important and worthy of vindication after the state trial as it was before. "The federal government had an interest, independent of any state interest, to ensure that an individual who is believed to have violated a federal statute is prosecuted for that violation." *Talley*, 16 F.3d at 974.

We hold that the dual sovereignty doctrine is fully applicable in this case and that DeCaro's double jeopardy claim therefore lacks merit.

B.

Both **DeCaro** and Basile argue that the United States Attorney in this case nevertheless **{109 F.3d 1308}** violated the constitutional prohibition against double jeopardy by failing to follow an internal United States Department of Justice (DoJ) policy concerning duplicative and successive prosecution by the federal government. Known as the *Petite* policy for the case wherein the Supreme Court first described it, *see Petite v. United States*, 361 U.S. 529, 531, 4 L. Ed. 2d 490, 80 S. Ct. 450 (1960) (per curiam), it "was formulated by the Justice Department in direct response to" the opinions in *Bartkus* and *Abbate*, *Rinaldi v. United States*, 434 U.S. 22, 28, 54 L. Ed. 2d 207, 98 S. Ct. 81 (1977) (per curiam). Under the policy, a United States attorney may not prosecute a person in federal court "if the alleged criminality was an ingredient of a previous state prosecution against that person" unless the federal prosecution "is specifically authorized in advance by the [DoJ] itself, upon a finding that the prosecution will serve 'compelling interests of federal law enforcement.'" *Thompson v. United States*, 444 U.S. 248, 248, 62 L. Ed. 2d 457, 100 S. Ct. 512 (1980) (per curiam). **DeCaro** and Basile argue that the federal government had no "compelling interests" to be served here.

We are not convinced that the federal prosecution in this case failed to meet the "compelling interests" requirement of the *Petite* policy. We need not and do not decide the question, however, because the *Petite* policy is "not constitutionally mandated," *Rinaldi*, 434 U.S. at 29, and otherwise "confers no substantive rights on the accused," *United States v. Moore*, 822 F.2d 35, 38 (8th Cir. 1987) (per curiam). Thus the DoJ's implementation of the policy "cannot form the basis of a claim [by a defendant] that the prosecution was improper." *United States v. Lester*, 992 F.2d 174, 176 (8th Cir. 1993). Further, if subsumed in the defendants' argument is the contention that the DoJ improperly waived the policy here, we are without authority to review such a DoJ decision "because the *Petite* policy is an internal administrative policy." *United States v. Kummer*, 15 F.3d 1455, 1461 (8th Cir. 1994).

Notwithstanding this Court's continuing affirmation that review of alleged DoJ *Petite* policy violations is not available unless sought by the government itself, DeCaro and Basile argue that we should revisit the issue and adopt the reasoning of a concurrence in an Eighth Circuit opinion that predates all of the cases cited above. *See Delay v. United States*, 602 F.2d 173, 179 (8th Cir. 1979) (Heaney, J., concurring) (suggesting that *Petite* policy "should be enforceable by a defendant in an appropriate case"), *cert. denied*, 444 U.S. 1012, 62 L. Ed. 2d 641, 100 S. Ct. 660 (1980). It is clear, however, that this is not the direction in which the Court is headed. *See, e.g., Kummer*, 15 F.3d at 1461 (opinion of the Court by Heaney, J.). And in any event, as a panel we are without authority to overrule precedents established by other panels of this Court; that can be accomplished only by the Court sitting *en banc. See United States v. Knight*, 96 F.3d 307, 310 (8th Cir. 1996).

III.

DeCaro and Basile also argue that the District Court erred in denying their motions for severance of their trials. 4 We will not reverse on this ground unless we find that the denial of severance was an abuse of discretion resulting in "severe or compelling prejudice" to the accused. *United States v.* **{109 F.3d 1309}** *Melina*, 101 F.3d 567, 571 (8th Cir. 1996) (quoting *United States v. Koskela*, 86 F.3d 122, 126 (8th Cir. 1996)).

"There is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. United States*, 506 U.S. 534, 537, 122 L. Ed. 2d 317, 113 S. Ct. 933 (1993). A joint trial is especially compelling when the defendants are charged as co-conspirators, as is the case here. *See United States v. Warfield*, 97 F.3d 1014, 1018 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1119 (1997); *Koskela*, 86 F.3d at 126. But whether or not the codefendants also are charged as co-conspirators, "the presumption against severing properly joined cases is strong." *United States v. Delpit*, 94 F.3d 1134, 1143 (8th Cir. 1996). DeCaro and Basile claim, however, that they presented antagonistic defenses, so that trying them together was an abuse of the trial court's discretion and resulted in the necessary prejudice to each to warrant new trials. We disagree.

In the first place, we are not persuaded that the two defenses are properly characterized as antagonistic. DeCaro, who testified at the trial, claimed he hardly knew Basile, and denied any participation in the vehicle thefts or the murder. His strategy was to cast blame on Craig Wells, who was an employee at the Amoco station where DeCaro worked as service manager and who is a relative--of sorts--of Basile. 5 In support of his theory that Wells may have been involved, DeCaro adduced testimony that Wells had access to the DeCaro vehicle keys and that Wells was a known liar. DeCaro claimed Wells knew of DeCaro's plans to be out of town on the day of the murder, and there was testimony from one of DeCaro's witnesses that Wells was not at work at the station during the time when the murder may have been committed. The jury could have drawn the inference that Wells and Basile were the co-conspirators, instead of DeCaro and Basile, with DeCaro making the case against Wells and the government making the case against Basile. But it is clear from the transcript that DeCaro's counsel did not assume a role as prosecutor by attempting to prove Basile guilty of the crimes charged. We do not suggest that DeCaro presented a defense to the government's case against Basile, but he made no concerted effort to depict Basile as the perpetrator of the crimes with which DeCaro himself was charged, to the exclusion of all other possible suspects.

As for Basile, a defense theory was not apparent from the witnesses he called. Basile did not testify in his own defense and called only two witnesses, both of whom were emergency medical personnel who attended Elizabeth DeCaro at the murder scene and testified as to her condition. But Basile and DeCaro claim that Basile did have a "defense," and that it was laid out by Basile's counsel in his opening statement and closing argument. In his comments to the jury, counsel conceded that Basile

stole the **DeCaro** vehicles, but he argued against the prosecution theory that Basile murdered Elizabeth **DeCaro**, whether with or without the collusion of her husband. It is clear, however, that during the evidentiary portion of the trial, Basile conceded nothing. From the trial transcripts it is apparent that Basile's counsel closely cross-examined the witnesses called by **DeCaro**, including **DeCaro** himself, as well as those witnesses called by the government, primarily to undermine the government's case as to Basile's involvement in the murder, not to point an accusing finger at **DeCaro**.

But even if DeCaro's and Basile's defenses were mutually antagonistic, we would not send the case back to the District Court for new trials. "Mutually antagonistic defenses are not prejudicial *per se*," *Zafiro*, 506 U.S. at 538, and even blame- shifting on the part of the defendants "is not a sufficient reason for severance," *United States v. Bordeaux*, 84 F.3d 1544, 1547 (8th Cir. 1996). "Co-defendants are often hostile to one another, and one will try frequently to**{109 F.3d 1310}** 'point the finger,' to shift the blame, or to save himself at the expense of the other." *Delpit*, 94 F.3d at 1143. Such tactics rise to the level of antagonistic defenses requiring severance "only when 'there is a danger that the jury will unjustifiably infer that *this conflict alone demonstrates that both are guilty*.'" *Id.* (citations to quoted cases omitted) (emphasis in *Delpit*). Any conflict in the evidence presented at this trial does nothing of the kind, but simply is indicative at most that each defendant was attempting to save his own skin by diverting the jury's attention to the other.

To demonstrate the severe or compelling prejudice necessary to show that the court abused its discretion in denying severance, "a defendant must show that his defense was irreconcilable with that of the codefendant or that the jury was unable to compartmentalize the evidence." *Bordeaux*, 84 F.3d at 1547. As demonstrated by our discussion above, we do not believe that the defenses of **DeCaro** and Basile (to whatever extent Basile actually put on a defense) were so antagonistic as to be irreconcilable. Because there was no serious finger-pointing by the defendants toward one another during the evidentiary phase of the trial, notwithstanding some desperation blame-shifting by counsel in closing arguments, the jury in its deliberations might have bought into DeCaro's defense, or Basile's "defense," or both--or neither. Further, having reviewed the entire transcript, we are satisfied that the jury could not have had any difficulty compartmentalizing the evidence against each defendant. There were only two defendants, the charges varied little between **DeCaro** and Basile and were not complicated, and the issues were not complex. We conclude that neither **DeCaro** nor Basile has met his heavy burden of demonstrating the prejudice required for reversal. *See United States v. McGuire*, 45 F.3d 1177, 1187 (8th Cir.), *cert. denied*, 115 S. Ct. 2558 (1995). 6

IV.

Both **DeCaro** and Basile argue that the evidence was insufficient to prove the necessary interstate activity to support federal charges and that the District Court therefore erred in denying their motions for acquittal. **DeCaro** and Basile do not claim that the evidence was insufficient to prove that **DeCaro** hired Basile to murder Elizabeth **DeCaro**, nor do they challenge the mail fraud convictions related to the filing of insurance claims. Instead, their sufficiency argument is limited to the issue of whether the government proved the requisite connection between the use of the mail or facilities in interstate commerce and the murder-for-hire plot.

"Our standard of review on this issue is quite narrow." *United States v. Smith*, 104 F.3d 145, 147 (8th Cir. 1997). We view the evidence in the light most favorable to the guilty verdict, giving the government the benefit of all reasonable inferences that may be drawn from the evidence. After reviewing the evidence under these standards, we will reverse only if we conclude that no reasonable jury could find guilt beyond a reasonable doubt. We may affirm even if the evidence is entirely circumstantial. *See id.*

stole the van, testified that the theft was an "insurance scam" and that, during the course of their time together that night, she heard Basile say "that he had been offered $ 15,000 to kill someone's wife." *Id.* at 2-17, -18. Jeffrey Niehaus, a friend of Basile, said Basile told him that the van theft "was set up through the owner and it was insurance" and that Basile referred to stealing the van as part of a "double job." *Id.* at 2-189. Basile also told Niehaus that Basile would be **{109 F.3d 1312}** receiving "over $ 9,000" for stealing the Blazer, which Niehaus thought was an "awfully lot" of money for just stealing a car. *Id.* at 2-191. Kenneth Robinson, an acquaintance of Basile, testified that Basile said that "he knew someone who had a van that he wanted to get rid of and have his wife disappear at the same time." *Id.* at 4-256. Basile's friend Dennis Williams testified that, after the murder, Basile told Williams "that he had recently done an insurance job on a van for [murder victim Elizabeth DeCaro's] husband." *Id.* at 4-250. In addition, Basile told his half brother Doug Meyer that "he was doing an insurance job" when Meyer saw the cut-up Blazer in the garage he had let Basile borrow and realized that the vehicle was implicated in the **DeCaro** murder. *Id.* at 4-23. There was no evidence that Basile received from **DeCaro** anything more than several hundred dollars before the murder. But there was evidence that **DeCaro** was not in good financial shape at the time of the murder, and that he would not have been able to pay Basile $ 15,000 in cash (or $ 9,000, for that matter) without the proceeds from the insurance on Elizabeth DeCaro's life.

Having reviewed the evidence according to the standards discussed above, we conclude that the insurance transactions involving the **DeCaro** vehicles and items taken from the **DeCaro** van and home provide the required nexus between the mail or facilities in interstate commerce and the murder-for-hire to sustain Basile's conviction. It does not appear, and the government does not contend, that the insurance proceeds from the property insurance policies were to be used to pay Basile for killing Elizabeth, given that the funds were not sufficient to do so. There was a substantial lien on the van, and the value of the stolen property and the Blazer was not enough to cover the price of the murder contract. As explained below, the evidence nevertheless was sufficient to prove that **DeCaro** filed the property insurance claims, at least in part, in order to cover the co-conspirators' involvement in the thefts, which themselves occurred as a part of the plot to murder Elizabeth **DeCaro**—in the words of Basile, "the package deal."

After Elizabeth was killed, **DeCaro** told Elizabeth's sister that the murderer must have been "casing the joint." Trial Transcript at 3-51. The jury reasonably could infer from that testimony that the theft of the van was staged to create a scapegoat, that is, an unknown assailant who just a month before the murder had "cased" the **DeCaro** home when stealing the van. As for the Blazer, the evidence was substantial that the vehicle was stolen, at least in part, to be used as Basile's "getaway" vehicle after he murdered Elizabeth **DeCaro** in her home. 8 Thus a reasonable jury could conclude that the thefts of the vehicles were part of the murder plot, and that the insurance claims were filed, not merely for the sake of collecting the insurance money, but to give **DeCaro** the appearance of innocence. 9 The evidence of the requisite nexus between the use Basile caused to be made of the mail or facilities in interstate commerce and the murder-for-hire plot, while circumstantial, is sufficient for a reasonable jury to find the requisite linkage between Basile, the interstate activity of his co-conspirator, and their contract for the murder of Elizabeth **DeCaro**.

We hold that the District Court did not abuse its discretion in denying Basile's motion for judgment of acquittal on the murder-for-hire charges.

B.

DeCaro, like Basile, acknowledges his use of the mails and facilities in interstate commerce but challenges the sufficiency of the government's proof that such use was in furtherance of the murder-for-hire plot. The analysis above concerning Basile applies with even greater force to

DeCaro. Moreover, {109 F.3d 1313} DeCaro's interstate activity concerning the life insurance policy provides an additional interstate connection to the murder plot. The government has the benefit of the logical inference that the purchase of the policy on Elizabeth DeCaro's life was an integral part of DeCaro's scheme to have her murdered. Further, the evidence permits the inference that DeCaro, otherwise lacking the ability to pay Basile for his services, intended to pay him when DeCaro collected the $ 100,000 on the life insurance policy.

We hold that the District Court did not err in denying DeCaro's motion for judgment of acquittal, as a jury could find beyond a reasonable doubt the necessary connection between his use of the mail or facilities in interstate commerce and the murder-for-hire scheme.

V.

The judgment of the District Court is affirmed.

Footnotes

1
2

The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

3

Basile was charged with and found guilty of two counts of mail fraud based on the filing of fraudulent insurance claims for the loss of the two DeCaro vehicles. DeCaro was charged with and found guilty of those two counts plus three additional counts of mail fraud based on other fraudulent insurance claims filed for the loss of personal property stolen from the DeCaro home at the time of Elizabeth's murder and on a claim filed on a policy insuring Elizabeth's life.

4

The government argues that this claim was not preserved for review by either DeCaro or Basile because neither renewed his motion for severance at the close of the government's case or at the end of trial. (DeCaro did renew his motion at sentencing, but by then it was too late to preserve the issue for review.) Therefore, the government contends, we should review the District Court's denial of the severance motions only for plain error. *See United States v. Bordeaux*, 84 F.3d 1544, 1547 (8th Cir. 1996). In his reply brief, DeCaro suggests that the District Court granted him a "continuing motion." Reply Brief of DeCaro at 3. As we read the transcript, however, we think it clear that the court granted the defendants continuing objections to evidentiary rulings, not a "continuing motion" for severance. *See* Trial Transcript at 1-3 ("The requests will be denied with the exception that the *objections that are made* can be continuing and can apply not only to the opening statement of the government but to the testimony of government as well.") (emphasis added). In any event, our review, whether for plain error or for an abuse of discretion, produces the same result.

5

Wells's stepmother was the foster mother of Doug Meyer, Basile's half brother. Wells and Basile referred to each other as "brother," and some of their acquaintances knew them as brothers.

6

The government also argues that several of the instructions given by the court cure any prejudice that may have resulted from the joint trial, citing *Zafiro v. United States*, 506 U.S. 534, 539, 122 L. Ed. 2d 317, 113 S. Ct. 933 (1993). The record furnished by the parties is incomplete on this point, as

copies of the relevant instructions were not included, so we do not rely on this for our holding.
7

There was evidence at trial that some of the items Basile supposedly removed from the van, and for which **DeCaro** claimed and received insurance reimbursement, were found in the **DeCaro** home when authorities were investigating Elizabeth's murder.
8

Basile does not "admit" in his brief that he stole the Blazer as he did the van, but the evidence presented at trial provides overwhelming proof that he did. Therefore, the Blazer's role in the murder, and the interstate transactions related to its theft, are relevant to the analysis.
9

DeCaro did not file the claims on the Blazer and the property stolen from his home until after his release by state authorities following his acquittal on murder charges, but those transactions could be seen by a reasonable jury as a part of DeCaro's continuing effort to appear innocent of his wife's murder.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA	)	
	)	
vs.	)	PRESENTENCE INVESTIGATION REPORT
	)	
RICHARD DECARO	)	Docket No. 1:96CR00005 SNL
	)	Defendant No. 001

Prepared For: The Honorable Stephen N. Limbaugh
U.S. District Judge

Prepared By: Paul H. Boyd
U.S. Probation Officer
Cape Girardeau, Missouri
573/334-9651

Assistant U.S. Attorney
Thomas Dittmeier
1114 Market St., Room 401
St. Louis, MO 63101
(314) 539-2200

Defense Counsel
Scott N. Rosenblum
7700 Bonhomme
St. Louis, MO 63105
(314) 862-3535

Sentence Date: June 21, 1996

Offense: Count One: Conspiracy to Commit Murder for Hire, 18 USC 371 - 5 years/$250,000.00 fine, a Class D felony.

Count Two: Use of Interstate Commerce During the Commission of Murder for Hire, 18 USC 1958 and 2 - Life Imprisonment/$250,000.00 fine, a Class A felony.

Count Three, Four, Five, Six, and Seven: Mail Fraud, 18 USC 1341 and 2 - 5 years/$250,000.00 fine, a Class D felony.

Release Status: On May 31, 1995, released on a $250,000.00 collateral bond. Returned to federal custody on March 7, 1996.

Detainers: None

Codefendants: Daniel Basile - 1:96CR00005 SNL

Related Cases: None

Date Report Prepared: May 1, 1996

Date Report Revised:

FINAL COPY

van. In addition, the Allstate Insurance Company paid DeCaro $1,900.00 in Claim No. 2612626313 relative to personal property allegedly stolen from the residence on March 6, 1992.

19. The probation office was unable to determine the extent of any psychological impact upon the DeCaro children and/or the immediate family members of Elizabeth DeCaro. Elizabeth DeCaro's murder is the most serious consequence of Richard DeCaro's scheme.

ADJUSTMENT FOR OBSTRUCTION OF JUSTICE

20. The probation office has no information to suggest that the defendant has impeded or obstructed justice.

ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY

21. The defendant put the government to its burden of proof at trial and has continued to maintain his innocence. He has in no way exhibited behavior demonstrating acceptance of responsibility for the instant offense.

OFFENSE LEVEL COMPUTATION

22. The 1995 edition of the Guidelines Manual was used in this case.

23. Counts one and two are grouped together for purposes of the offense level computation pursuant to Section 3D1.2(a). Counts three through seven are grouped together for purposes of the offense level computation pursuant to Section 3D1.2(d), as the offense level is determined largely on the basis of the total amount of harm or loss.

Counts one and two: Conspiracy to Commit Murder for Hire and Murder for Hire.

24. **Base Offense Level:** The guideline for violations of 18 USC 371 and 1958 is ultimately found in Section 2A1.1 of the Guidelines Manual and calls for a base offense level of 43. 43

25. **Victim Related Adjustment:** None. 0

26. **Adjustment for Role in the Offense:** None. 0

27. **Adjustment for Obstruction of Justice:** None. 0

28. **Adjusted Offense Level (subtotal):** None 43

Counts three through seven: Mail Fraud.

29. **Base Offense Level:** The guideline for violations of 18 USC 1341 is found in Section 2F1.1(a), and calls for a base offense level of 6. 6

30. **Specific Offense Characteristics:** Because the loss exceeded $120,000.00, seven levels are added pursuant to Section 2F1.1(b)(1)(H). +7

31. **Specific Offense Characteristics:** Because the offense involved more than minimal planning and a scheme to defraud more than one victim, two levels are added pursuant to Section 2F1.1(b)(2). +2

32. **Adjustment for Role in the Offense:** None. 0

33. **Adjustment for Obstruction of Justice:** None. 0

34. **Adjusted Offense Level (subtotal):** 15

35. Multiple Count Adjustment (see Chapter 3, Part D)

			Units
36.	Counts one and two Adjusted Offense Level	43	1
37.	Counts three through seven Adjusted Offense Level	15	0
38.	Total Number of Units		1
39.	Greater of the Adjusted Offense Levels Above:	43	
40.	Increase in Offense Level:	0	
41.	**Combined Adjusted Offense Level:**	43	43
42.	**Adjustment for Acceptance of Responsibility:**	None.	0
43.	**Total Offense Level:**		43
44.	**Chapter Four Enhancement:** None.		0
45.	**Total Offense Level:**		43

OFFENSE BEHAVIOR NOT PART OF RELEVANT CONDUCT

46. None.

Pursuant to Section 5D1.2(a)(2), the term of supervised release for each of counts one, three, four, five, six, and seven shall be at least two years but not more than three years.

PROBATION

78. **Statutory Provisions:** As to count two, the defendant is ineligible for probation pursuant to 18 USC 3561(a)(1).

79. As to each of counts one, three, four, five, six, and seven, the defendant is ineligible for probation by statute, pursuant to 18 USC 3561(a)(3).

80. **Guideline Provisions:** As to count two, the defendant is ineligible for probation pursuant to Section 5B1.1(b)(1). As to each of counts one, three, four, five, six, and seven, the defendant is ineligible for probation pursuant to Section 5B1.1(b)(3) and Application Note 2.

FINES

81. **Statutory Provisions:** As to each of counts one, two, three, four, five, six, and seven, the maximum fine is $250,000.00, pursuant to 18 USC 3571(b)(3).

82. A special assessment of $50.00 is mandatory as to each of counts one, two, three, four, five, six, and seven, for a total of $350.00, pursuant to 18 USC 3031.

83. **Guideline Provisions:** The fine range for this offense is from $25,000.00 [Section 5E1.2(c)(1)] to $250,000.00 [Section 5E1.2(c)(2)].

84. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the costs to the government for any imprisonment, probation, or term of supervised release ordered [Section 5E1.2(i)]. The most recent advisory from the Administrative Office of the United States Courts, dated March 10, 1995, suggests that a monthly cost of $1,779.33 be used for imprisonment, a monthly cost of $195.30 be used for supervision, and a monthly cost of $1,183.08 be used for halfway house placement.

RESTITUTION

85. **Statutory Provisions:** Restitution pursuant to the Victim and Witness and Protection Act of 1982 is applicable. As to counts one and two, the loss of Elizabeth DeCaro's life is not calculable. As to counts three through seven, the

APPENDIX "C"

96-2746

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI, SOUTHEAST DIVISION

UNITED STATES OF AMERICA, Plaintiff,	
v.	No. 1:96CR005SNL
RICHARD DECARO, Defendant.	VOLUME 10

SENTENCING HEARING

BEFORE THE HONORABLE STEPHEN N. LIMBAUGH
UNITED STATES DISTRICT JUDGE

JUNE 21, 1996

APPEARANCES:

For Government: MR. THOMAS E. DITTMEIER, AUSA
MR. HOWARD MARCUS, AUSA
Office of U.S. Attorney
1114 Market Street
St. Louis, MO 63101
314-539-2200

For Defendant: MR. N. SCOTT ROSENBLUM (For Decaro)
MS. SUSAN KISTER
Wittner and Poger
7700 Bonhomme Avenue, Suite 400
St. Louis, MO 63105
314-862-3535

REPORTED BY: PATTI DUNN WECKE, RMR
Official Court Reporter
#813 U.S. Courthouse
1114 Market Street
St. Louis, Missouri 63101
(314) 621-2767

PRODUCED BY COMPUTER AIDED TRANSCRIPTION

#1664

CERTIFICATE

I, Patti Dunn Wecke, Registered Merit Reporter, hereby certify that I am a duly appointed, qualified, and acting official court reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case, and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 - 6 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 26th day of July, 1996.

Patti Dunn Wecke

PATTI DUNN WECKE, RMR
Official Reporter

(THE FOLLOWING PROCEEDINGS WERE HAD ON JUNE 21, 1996, IN OPEN COURT, AND WITH DEFENDANT PRESENT:)

THE COURT: We are here for sentencing in the case of United States versus Richard DeCaro. Parties will come forward.

(COUNSEL AND DEFENDANT COMPLY)

THE COURT: The Government appears by Assistant United States Attorney Thomas Dittmeier and Howard Marcus. The defendant Richard DeCaro appears in person and by his attorney Scott Rosenblum.

I have the presentence investigation report. The addendum to the report indicates that neither the Government nor the defendant have filed objections to the report. Mr. Rosenblum, are there any objections you wish to file?

MR. ROSENBLUM: No, Your Honor.

THE COURT: Mr. DeCaro, have you had an opportunity to review a copy of the report?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any corrections you wish to make to it?

THE DEFENDANT: No, Your Honor.

THE COURT: I am ready to consider sentencing Mr. DeCaro and I'll be glad to hear from you, Counsel, and then from Mr. Decaro if he wishes to make a

statement.

MR. ROSENBLUM: Your Honor, I don't have allocution per se, the only thing I would ask is to let the record reflect, and I'm asking the Court to reconsider the motion for double jeopardy that was filed before this case, also the motion for severance that was filed before this case.

The Court had an opportunity to see the trial, the Court had an opportunity to witness Mr. Basile who was on holiday from death row during the course of this trial, and saw what I believe was his disdain for the system. And I can't imagine a case where there was more antagonistic defenses than this particular case, the defense of Mr. DeCaro and the defense of Mr. Basile, and I think that that tainted this trial. And I would ask the Court to reconsider that motion.

THE COURT: First of all, I don't think that Mr. Basile was on holiday when we was facing another murder charge.

MR. ROSENBLUM: Your Honor, I was just making reference to his demeanor during the course of trial and particularly during jury selection where he didn't seem to be particularly interested in the seriousness of the proceedings, that was just my own personal observation.

THE COURT: Well, it is my opinion that neither

defendant in this case was jeopardized by having the case tried simultaneously as to each defendant. I felt that ahead of the trial and I feel it having conducted the trial that there was no prejudicial error in having these two defendants tried at the same time before the same jury. So I will continue to maintain my position that it was proper to try them in that capacity and I will deny your motion to reconsider this matter.

MR. ROSENBLUM: Thank you, Your Honor.

THE COURT: Mr. DeCaro, do you have any comment you wish to make before I sentence you?

THE DEFENDANT: Just that I'm innocent, Your Honor. I did not commit this crime. I loved Elizabeth very much. There's no way on God's earth I could ever do anything like this. That's all I have to say.

THE COURT: Mr. Dittmeier? Mr. Marcus?

MR. DITTMEIER: I have no statement, Judge.

THE COURT: Well, Mr. DeCaro, the jury didn't believe you and I don't believe you. As far as I'm concerned you are guilty. It was not only a despicable act, it was a cowardly act.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant Richard DeCaro is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of life.

This term consists of a term of life as to Count 2 and 60 months as to each of Counts 1, 3, 4, 5, 6, and 7. All of these terms shall run concurrently; there is an aggregate term of imprisonment of life.

Should the defendant ever be released from imprisonment, he shall be placed on a period of supervised release for a term of three years. This term consists of terms of three years as to each of Counts 1 through 7, and all of these shall run concurrently with an aggregate term of supervised release of three years.

Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which he is released. While on supervised release he shall comply with the standard conditions that have been adopted by the Court.

It is mandated that he pay a special assessment of $50 as to each of the seven counts involved, or a total of $350, and I levy that assessment.

Other than that sum, I will determine he does not have sufficient funds with which to pay the minimum fine in this case and I will waive the requirement that he pay a fine.

It is the opinion of the Court that the sentence that I have just set out does properly address

the sentencing objectives of punishment, general deterrence, and incapacitation. I levy the sentence for those reasons as well as for the additional reasons given to the Court by the probation officer in its recommendation, as well as for the other comments I have made in connection with this sentencing:

Now, Mr. DeCaro, I'm sure you are aware and have discussed this with your attorney, you have the right to appeal your jury verdict, my judgment on the jury verdict, and the sentence that I've just levied against you. You understand you have the right to appeal?

THE DEFENDANT: Yes, sir.

THE COURT: And if you do not have the funds with which to employ an attorney, then an attorney will be provided for you to assist you in an appeal. Do you understand you have all those rights?

THE DEFENDANT: Yes, I do.

THE COURT: Anything further we need to consider Counsel?

MR. DITTMEIER: I have nothing further, Judge.

THE COURT: Defendant will continue to be remanded to custody. We'll be in recess.

(COURT ADJOURNED)

APPENDIX "D"

VERDICT

We, the jury, find the defendant Richard DeCaro not guilty.

FOREPERSON

FILED
SEP 14 1994
SUSAN E. [illegible]
Circuit Clerk
ST CHARLES COUNTY

FILED
SEP 14 1994
[illegible]
ST CHARLES COUNTY

STATE OF MISSOURI v.
RICHARD DECARO No. 92-650

INSTRUCTION NO. 7

Unless you find and believe from the evidence beyond a reasonable doubt that the defendant caused the death of Elizabeth DeCaro by hiring Daniel Basile to shoot her, then you must find the defendant not guilty of murder in the first degree.

INSTRUCTION NO. 10

Unless you find and believe from the evidence beyond a reasonable doubt that the defendant aided or encouraged Daniel A. Basile in causing the death of Elizabeth A. DeCaro by shooting her, then you must find the defendant not guilty of murder in the second degree under Instruction No. 9.

MAI-CR 3d 313.02 Converse

Submitted by the Defendant

INSTRUCTION NO. 12

Unless you find and believe from the evidence beyond a reasonable doubt that the defendant aided or encouraged Daniel A. Basile in the commission of the offense of burglary in the first degree as submitted in Instruction No. 13 which resulted in the death of Elizabeth A. DeCaro, then you must find the defendant not guilty of murder in the second degree under Instruction No. 11.

MAI-CR 3d 313.02 Converse

Submitted by the Defendant

APPENDIX "E"

U.S. v. RICHARD DECARO & DANIEL BASILE NO. 1:96CR5 SNL

INSTRUCTION NO. 31

The essential elements of the crime of murder for hire as charged against each defendant in Count II are as follows:

One: The defendant used or caused another to use the mail, or used or caused another to use any facility in interstate commerce.

Two: The defendant did so with the intent that a murder be committed in violation of the laws of the State of Missouri.

Three: The defendant did so as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value.

It is not necessary for the United States to prove that any use of the mail or facilities in interstate commerce was contemplated or planned at the time that the course of activity began, or that the defendant under consideration knew he or someone else would actually use the mail or facilities in interstate commerce as part of the activity. It is sufficient to establish this element of the crime if the mail or a facility in interstate commerce was used as part of the course of activity charged in Count II and that one of the reasons for this use was to further the activity described in Count II.

A telephone communication from one state to another constitutes the use of a facility in interstate commerce. For purposes of these elements, however, a mailing from one location to another within the State of Missouri constitutes a use of the mails.

Objection

It is not necessary for the United States to prove that a contract for the murder was in existence at the time of the mailing or telephone communication. Nor is it necessary for the United States to prove that the consideration for the murder had been provided at the time of the mailing or telephone communication.

The term "pecuniary value" means money or any item that the person receiving or promising to pay considers to be worth something. It is not necessary for the United States to prove that money or a similar item was actually exchanged or delivered.

You are also instructed that laws of the State of Missouri, Section 565.020 of the Missouri Revised Statutes, provides that "a person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." The laws of Missouri further provide that "deliberation means cool reflection for any length of time no matter how brief."

18 U.S.C. §1958(a)

United States v. McGuire, 45 F.3d 1177, 1186-1187 (8th Cir. 1995)

United States v. Sanchez, 992 F.2d 1143, 1158-1159, reh'g denied, 3 F.3d 366 (11th Cir. 1993), cert. denied 114 S.Ct. 1057 (1994) (summarizes elements)

United States v. Razo-Leora, 961 F.2d 1140, 1148 (5th Cir. 1992) (mail or use of interstate facility is jurisdictional only and, as a result, specific intent need only be proven as to the underlying offense of murder). See also, United States v. Edelman, 873 F.2d 791, 794-795 (5th Cir. 1989)

United States v. Ellison, 793 F.2d 942, 950 (8th Cir. 1986), cert. denied, 479 U.S. 937 (1986) (proof of travel in Section 1952 prosecution need only be in conjunction with the criminal conduct)

United States v. Ransbottom, 914 F.2d 743, 745-746 (6th Cir.), cert. denied, 111 S.Ct. 439 (1990) (contract need not be in existence at time mailing or telephone communication was made)

APPENDIX "F"

now.

MR. DITTMEIER: I have none.

MS. KISTER: With respect to Instruction 31, the elements that are required for murder for hire. I'd like the record to reflect that we interpose at this time an objection to that instruction, on the basis that it misstates the law and mischaracterizes the statute on which it's based. And with respect to Instruction 33 the elements of mail fraud, I would interpose an objection to that instruction at this time, in addition to the objection I made yesterday, which pertained to the omission of language of that instruction, as well as it misstates the statute, misstates the law. And finally I object to the jury being given the indictment to take back into the deliberations.

We would submit that this basically restates the Government's case and reinforces Mr. Dittmeier's closing argument for the jury.

MR. FLYNN: I would join in all three of those objections, Your Honor.

THE COURT: All right. Very well. The objections will be overruled. I think the instructions properly state the law in connection with the area to which the instruction is intended to apply.

MR. FLYNN: I would also make the motion to

APPENDIX G

III. *Conclusion* **United States v. Young, 753 F.3d 757, 783 (8th Cir. 2014)**

Based on the foregoing, we affirm the judgment of the district court. KELLY, Circuit Judge, concurring.

Young and Mock were charged with two federal crimes: (1) using facilities of interstate commerce in the commission of a murder-for-hire (Count 2); and (2) "conspir[ing] to do so" (Count 1), both in violation of 18 U.S.C. § 1958. While I concur in the court's judgment to affirm these convictions, I write separately because I sense an increasing misunderstanding of the relevant statute at issue in this case.

"Section 1958(a) is not a murder statute; it is a carefully-drafted federal criminal law of constitutionally limited scope." *United States v. Delpit,* 94 F.3d 1134, 1150 (8th Cir.1996). Section 1958 reads as follows: Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be [punished according to this statute]. 18 U.S.C. § 1958(a). As we have previously explained:

This statute is relatively straightforward, both in what it prohibits and in what it does not reach. It does not prohibit murder or attempted murder. Instead, it outlaws using interstate-commerce facilities with the intent that murder-for-hire be committed. Once the interstate-commerce facility is used with the required intent the crime is complete. One who travels or causes another to travel in interstate commerce with the necessary murderous intent need not do anything else to violate the statute. See United States v. McGuire, 45 F.3d [1177,] 1186-87 [(8th Cir.1995)]. It is clear, moreover, that a defendant can violate § 1958(a) without actually hurting or killing anyone, because the statute provides for enhanced punishment when death or injury results from the defendant's violation of the statute. If there were any doubt, it would be dispelled by the clear legislative history:The gist of the offense is the travel in interstate commerce or the use of the facilities of interstate commerce or of the mails with the requisite intent and the offense is complete whether or not the murder is carried out or even attempted.

Delpit, 94 F.3d at 1149-50 (quoting S.Rep. No. 225, 98th Cong., 2d Sess. 306 (1984), *reprinted in,* 1984 U.S.C. Cong. & Admin. News 3182, 3485). Thus, the elements of Count 2, as relevant to this case, are that a defendant (1) used a facility in interstate commerce, or caused another to do so; (2) with the intent that a murder be committed; (3) "as consideration for a promise or agreement to pay," i.e., "for hire." *Id.* at 1149. **[753 F.3d 785]** In this case, the government started its closing argument by addressing the elements of the offense. After listing a few examples of the use of a facility in interstate commerce, including the use of a telephone or a debit card, the government argued to the jury: "So clearly interstate facilities have been used in furthering this crime." But Young and Mock were not charged with using a facility of interstate commerce "in furtherance of" the crime of murder or murder-for-hire. Rather, they were charged with using a facility of interstate commerce, with the requisite intent.[8] To the extent some of our cases suggest otherwise, I respectfully submit that *Delpit* provides the more accurate reading of the statute. *Compare Delpit,* 94 F.3d at 1149-51, with *United States v. Basile,* 109 F.3d 1304, 1310-13 (8th Cir.1997), and *United States v. Mueller,* 661 F.3d 338, 345-47 (8th Cir.2011).[9]

Footnotes

8. The government also argued that "every phone call to the insurance companies" would be sufficient to establish the element of "use" beyond a reasonable doubt. Any phone call made after the murder, however, cannot be the "use" that amounts to the crime. Logically speaking, a person cannot "use" a facility of interstate commerce with the requisite intent after the murder has occurred.

9. Similarly, the conspiracy charged in this case was not a simple conspiracy to commit murder or even to commit a murder-for-hire, which happens to involve the use of a facility of interstate commerce. "To prove a conspiracy, the government needed to prove an agreement, between at least two people, the objective of which was to violate federal law." Delpit, 94 F.3d at 1151. Under § 1958, the object or illegal purpose of the charged conspiracy is to use a facility of interstate commerce with the intent to commit a murder-for-hire. See id. (reversing § 1958 conspiracy conviction because "[t]he government presented no evidence suggesting that Lynn conspired to cause [another person] to travel, or that she conspired with [another person] to travel, with the intent that a murder-for-hire be committed" (emphasis added)).